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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 771

ROSEMONT ENTERPRISES, INC.,

Petitioner,

—against—

RANDOM HOUSE, INC. and JOHN KEATS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Rosemont Enterprises, Inc. ("Rosemont") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above captioned case on August 17, 1966. That judgment vacated an order of the United States District Court for the Southern District of New York which had granted Rosemont a preliminary injunction against further infringement of its copyrights by respondents Random House, Inc. ("Random House") and John Keats ("Keats").*

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* Unless otherwise indicated, references to Random House should be deemed to include Keats.

Opinions Below

The opinion of the District Court granting the injunction is printed in Appendix "A" hereto and is reported at 256 F. Supp. 55 (S.D.N.Y. 1966). The decision of the Court of Appeals reversing the District Court is printed in Appendix "B" hereto. It has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on August 17, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the First Amendment limit the remedies available under the copyright laws to a copyright owner by reason of infringement of his copyright?

2. Does the granting of a remedy against a wilful or deliberate copyright infringement depend upon the subjective motive or purpose of the copyright owner in obtaining the copyright or in seeking relief?

3. Is the doctrine of fair use applicable where neither the infringed work nor the infringing work is scholarly or scientific and the infringement is not for purposes of review or comment but is a deliberate appropriation of the creative efforts of others in lieu of independent research or effort?

The District Court's decision answered each of the above questions in the negative and granted a preliminary

injunction. The decision of the Court of Appeals, which reversed the District Court, answered each question in the affirmative. The Court of Appeals, disagreeing with decisions of the Seventh and Ninth Circuits, held that as a matter of law the injunction was not available.

Statutory and Constitutional Provisions Involved

Title 17 U.S.C. Section 101(a) provides as follows:

> "If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:
>
> "(a) *Injunction.*
>
> "To an injunction restraining such infringement;"

Art. 1, Section 8, clause 8 of the Constitution states that:

> "The Congress shall have Power . . .
>
> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The First Amendment to the Constitution provides:

> "Congress shall make no law abridging the freedom of speech, or of the press; . . . ."

Statement of the Case

This is an action for copyright infringement by petitioner Rosemont against respondents Random House and Keats.* Rosemont is the owner of the copyrights on a series of articles entitled "The Howard Hughes Story" which ap-

* The jurisdiction of the District Court is predicated on 28 U.S.C. § 1338.

peared in Look Magazine in February and March of 1954. Random House is the publisher and Keats is the author of a book entitled "Howard Hughes—a Biography by John Keats" which infringes the copyrighted Look articles.

The articles were written in 1954 by Stephen White ("White") who was then Assistant Managing Editor of Look after a research effort consuming approximately eight months during which time White interviewed dozens of people and personally obtained and assembled a great deal of information from various sources in Texas, Los Angeles, San Francisco, New York and other places in preparation for interviewing Mr. Hughes. The record also reflects that White and other members of the Look staff had numerous personal conferences with Hughes stretching over a period of approximately five months for the purpose of developing biographical information not obtainable elsewhere and that such material and information formed the basis of the original work which appeared in Look (A-44a).*

Mr. Hughes has given no interviews since that time and the copyrighted series of Look articles have therefore become increasingly valuable since 1954.

The copyrights were originally obtained by Cowles Communications, Inc. and assigned on May 20, 1966 to Rosemont.

There is no dispute that the Look articles were copyrightable, that a copyright duly issued to Cowles, that Rosemont acquired title to the copyrights by a valid assignment for a valuable consideration, and that respondents had access to the Look articles and copied them.

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* References to "(A-)" refer to the appendix filed by appellants (here respondents) in the Court of Appeals.

Although Random House calls its book a "biography" it is clear from the record that it is actually a paste-pot conglomeration of previously published materials put together in hopes of creating a popular commercial success through the drawing power of the name of Howard Hughes, and not a genuine biographical effort at all.

Thus, the Random House book had its genesis not in the creative impulse of any author but in the corporate offices of Random House, a commercial enterprise, which solicited a "lively, fast-moving, unauthorized biography" about Hughes (B-73).* Random House characterized its book as being written in a "brash, journalistic" style (Ex. 143 to Random House deposition) and there is no pretense that its book is a scholarly or definitive history of the life of Hughes. The book has no bibliography, no footnotes, no index, and no Acknowledgment, and Keats in a letter to Random House states, "I'm not the author . . . " (B-99).

Moreover, although respondent Keats advised Random House that in order to do a proper biographical job he would require Random House to furnish him with a research assistant (B-108) or expenses for research, Random House refused to provide either (*cf.* B-103-109; B-67; B-70), and also flatly forbade Keats to make any effort to interview Hughes or his associates, although Keats strongly protested that a biography could not otherwise be properly written (B-89-90; A-180a; B-68).

In lieu of furnishing Keats with the wherewithal to do genuine biographical research, Random House furnished Keats with the copyrighted Look articles—which were described by Random House as by far the most authoritative pieces about Hughes ever done (B-92A)—and with

* References to "(B-)" refer to Rosemont's appendix in the Court of Appeals and references to "App. " refer to pages of the Appendix to this Petition.

other previously published and copyrighted material from, *inter alia*, Time, Life, Fortune, and the Saturday Evening Post. Keats did no independent research but compiled his manuscript entirely on the basis of work and effort of others as reflected by previously published materials (B-24; B-38-39; B-46-49).

The record reflects that Random House deliberately intended to pirate the material of others and to make use of the fruits of their labors in order to avoid the necessity for engaging in an independent effort. In fact the editor of Random House in charge of the Hughes book expressly advised Keats to paraphrase the copyrighted material of others so as to conceal the copying because "I would rather not have to go to them for permission to quote." (B-94) That Keats did copy the Look articles by wholesale paraphrasing as well as by direct quotations is evident from his notes produced during discovery.* It is also beyond dispute that Random House was aware of the necessity of obtaining permission from copyright owners. It admitted it was so advised by counsel (B-59-66) but nevertheless admitted that "There was no permission obtained for any material used in the book . . . ." (B-62).

In February, 1966 Rosemont, which had theretofore obtained certain rights from Hughes to his biography and the use of his name for commercial purposes, commenced an action against Random House and Keats in the Supreme Court of the State of New York seeking to enjoin further publication of the book on the grounds that the Random House book, although labelled a biography, is nothing more

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* The District Court expressly found *at least* twelve additional instances "where the use of particular phrases or slight rearrangement of language and sentence structure make it obvious that the Look material was copied by paraphrase." (App. 10) The Court of Appeals made no contrary finding. Rosemont submitted an analysis of the infringed and infringing works which shows at least forty-one instances of copying—either directly or by paraphrase (A-20a-39a).

than an unauthorized commercial exploitation of the personality of Hughes and that under New York law, see *Haelan Laboratories* v. *Topps Chewing Gum,* 202 F.2d 866 (2nd Cir.) *cert. denied* 346 U.S. 816 (1953); *Hill* v. *Hayes,* 15 N.Y.2d 986 (1965); *Spahn* v. *Messner,* —— N.Y.2d ——, Docket No. 158, decided Oct. 27, 1966, Rosemont was entitled to relief. Subsequent to the institution of the State action, which is still pending, Rosemont acquired the Look copyrights and brought this suit.

Rosemont then moved in the District Court for a preliminary injunction against further infringement. The District Court granted the motion holding that a *prima facie* showing of infringement had been made and that the doctrine of fair use was not applicable because (a) the Random House book was not scholarly or scientific but was published principally for commercial purposes, (b) the Random House book was likely to compete with the copyrighted materials to the detriment of the latter, and (c) the copying was a wilful and deliberate plagiarism which was done as a substitute for independent research and constituted an appropriation of the skill and effort of the original author.

Random House also argued to the District Court that Rosemont was not entitled to injunctive relief because it came into court with "unclean hands" in that its purpose and objective in seeking an injunction was to prevent the publication of any book about Hughes. The District Court held that even if these allegations were true such conduct did not amount to unclean hands justifying the denial of equitable relief. The District Judge said that since Rosemont was seeking by this action only to enforce the copyright laws, and was asking the court to enjoin an infringement, not to enjoin a biography, nothing was shown which would bar Rosemont from enforcing its rights as copyright owner.

The Court of Appeals reversed the District Court in two opinions, one by Chief Judge J. Edward Lumbard, which was joined in by Judge Paul R. Hays and one by Judge Leonard P. Moore, in which the other two judges joined, finding as a matter of law that the preliminary injunction should not have issued.

The Court of Appeals assumed that Rosemont was controlled by Hughes—notwithstanding that Hughes is neither an officer, director nor stockholder of Rosemont—and that Rosemont was engaged in an effort to protect Hughes' privacy against invasion by the Random House book. Accordingly, the Court of Appeals held (1) that it would be contrary to the "spirit of the First Amendment", which it said applied to the copyright law, to enjoin the infringement, (2) that the assumed motive of Rosemont in acquiring the copyrights to prevent their publication precluded the granting of the injunction and (3) that the District Court had erred in holding that fair use could not be applied where the infringement was contained in a popular, commercial work rather than a scholarly or scientific work and where the copying has been used as a substitute for independent research and effort.

In announcing its views on fair use, the Court of Appeals recognized that its decision is in conflict with that in *Loew's, Incorporated* v. *Columbia Broadcasting System,* 131 F. Supp. 165 (S.D. Calif. 1955), *aff'd,* 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam by an equally divided court,* 356 U.S. 43, and *Toksvig* v. *Bruce Publishing Co.,* 181 F.2d 664 (7th Cir. 1950).

Reasons for Granting the Writ

I

The first question raised by the decision of the Court of Appeals, *viz.*, whether an injunction against infringement is available to the owner of a copyright which has been wilfully and deliberately infringed because "the spirit of the First Amendment" applies to the copyright laws raises a fundamental constitutional issue which deserves review by this Court as to the impact of the First Amendment on private property rights.

The scope of the First Amendment's reach vis-a-vis the rights of the individual has recently received scrutiny from this Court where the right of the individual in his reputation has been viewed in relation to the rights of the press, *New York Times* v. *Sullivan*, 376 U.S. 254, and there is presently pending before this Court the question of the impact of the First Amendment on the individual right of privacy, *Time, Inc.* v. *Hill*, 382 U.S. 936.

The question presented by this petition involves the problem of whether the First Amendment limits in any way the federally created property or rights of copyright and the extent, if any, to which the First Amendment protects copyright infringements because the infringement consists of a writing for public consumption.

The decision of Judge Lumbard below for the first time applies the First Amendment to limit the remedy to which a copyright owner is entitled under the copyright law. But since the property of copyright has no intrinsic value and "Its value depend[s] upon the possibility of enforcement", *Washingtonian Pub. Co.* v. *Pearson*, 306 U.S. 30, 39, a deci-

sion that the First Amendment limits the available remedies is tantamount to a decision that the First Amendment affects the property in copyright. The decision of the Court of Appeals therefore has an impact upon the fundamental rights of all copyright owners and since the question involves an accommodation of the principles of the First Amendment to those contained in Article I, Section 8 of the Constitution, the resolution of the conflict, if any, between the two constitutional provisions should come from this Court.

The need for a determination of the constitutional question by this Court is underscored by the fact that there is presently pending in the Congress a General Copyright Revision Bill (HR 4347), 89th Cong., 2nd Sess. (1966) which was reported out of committee on September 28, 1966.

II

The second question raised by the decision below—which the Court of Appeals answered in the affirmative—whether the motive of a copyright owner in acquiring or seeking to enforce a copyright may deprive him of injunctive relief, is one of basic import to the publishing industry and to copyright owners generally.

The property right of copyright created by Congress is the right to exclude others from using the copyrighted material. The right to exclude depends upon the issuance of an injunction by the court. Thus, the refusal to grant a preliminary injunction where there is indisputably an infringement in effect is a refusal to grant the copyright owner the property in the copyright to which he is entitled as a result of registration of the copyright, and effects a deprivation by the court of the property which Congress has intended to confer. Where the deprivation is predicated

upon a motive not proven, but merely assumed by the Court of Appeals to exist, the court is depriving the copyright owner of property rights without statutory authority for the deprivation and without due process as well.*

It is no answer to say that a copyright owner may recover damages, for not only is the ascertainment of damage speculative and difficult, if not impossible, in such cases, but damages which are a recompense for the invasion of a property right cannot excuse the failure of a court to effectuate the Congressional grant or justify the act of a court in licensing, in effect, an infringer to use the copyright owner's material.

Under such circumstances the engrafting of a "motive" test on the right to obtain a preliminary injunction is particularly pernicious. The facts relating to subjective motive, purpose and intent have always been the most difficult and time consuming for the trier of fact to determine, particularly where, as here, the motive is not reflected by conduct. If the motive of a copyright owner in acquiring the copyright—whether originally or by assignment—is to be open to question, the effectiveness of a preliminary injunction as an exclusionary device is severely impaired. If the remedies available to copyright owners are to be curtailed in this fashion, the decision, because of its universal applicability in copyright cases, should come from this Court.

There is presently no precedent, in the scheme of the copyright law itself or in decisions of this Court for the notion that the acquisition of a copyright or its enforceability by injunction is dependent upon the motive of the

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* The problem is exacerbated when, as here, the assumptions made by the Judges of the Court of Appeals are based on a contention as to motive which was characterized by the District Judge as being predicated on "surmise and conjecture." (App. 20)

copyright owner in seeking to protect the copyrighted material. On the contrary, analagous decisions in patent law hold that the motive of a patent owner in seeking to exclude others from its use by means of injunction is immaterial to the right to obtain injunctive relief.

Strait v. *National Harrow Co.*, 51 Fed. 819 (C.C.N.D.N.Y. 1892) is a leading case. There, plaintiff sought to enjoin defendant from instituting any action against plaintiff for the infringement of defendant's patent on the grounds that the defendant was acquiring patents and attempting to use its patents to create a monopoly. This Court in *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, relied upon *Strait* and quoted the following portion of that case with approval:

> "'. . . the proposition that the plaintiffs, while infringing the rights vested in the defendant under letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to the letters patent, is a novel one, and entirely unwarranted. The party having such a patent has a right to bring suit on it, not only against a manufacturer who infringes, but against dealers and users of the patented article, if he believes the patent is being infringed; *and the motive which prompts him to sue is not open to judicial inquiry, because, having a legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for the attempt to assert his legal rights. 'The exercise of the legal right cannot be affected by the motive which controls it.' Kiff* v. *Youmans*, 86 N.Y. 329.'" (184 U.S. at 546; emphasis added.)

The decision of the Second Circuit that the motive of the copyright holder in suing to enforce his copyright may qualify rights under the copyright laws stands alone.*

III

The third question raised by the Court of Appeals decision, relating to the meaning and scope of the fair use doctrine, also deserves consideration by this Court—which has not addressed itself to the doctrine of fair use since *Baker* v. *Selden*, 101 U.S. 99 (1879)—because of the importance of that doctrine in the application of the copyright laws. This Court should review the decision below because that decision (a) establishes a new standard for the application of the fair use doctrine, (b) is in conflict with the standards contained in decisions of the Seventh and Ninth Circuits, and (c) finds a constitutional necessity in the fair use doctrine which may have serious consequences on the pending revision of the copyright laws.

The District Court held that the doctrine of fair use was applicable only where copyrighted material is used for purposes of criticism or in scholarly works of scientific or educational value. In reaching the conclusion that the doctrine of fair use was not applicable here the District Court relied upon the decisions in the Seventh and Ninth Circuits and the facts that the Random House book was

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* However, the District Court for the Southern District of New York had occasion to consider this question in *Southern Music Pub. Co.* v. *Seeco Records*, 200 F.Supp. 704 (S.D.N.Y. 1960), where in a copyright infringement suit defendant argued that plaintiff should be accorded no relief because its purpose in prosecuting the action was to coerce and harass defendant. The court said:

> "... if plaintiff has a valid cause of action, what its purpose is in pursuing it is of no moment in this proceeding." (200 F.Supp. at 705)

not a scholarly effort but a commercial book designed for the popular market and that the Look articles were copied as a substitute for independent effort and research.

The Court of Appeals reversed, holding that the District Court had too narrowly confined the applicability of the fair use doctrine and stated that it was not limited to scholarly or scientific works and that the doctrine was not rendered inapplicable by the fact that an infringing work is designed for the popular market or is distributed primarily for commercial purposes. A conflict with the decision of the Ninth Circuit case of *Loew's, Inc.* v. *CBS*, 131 F.Supp. 165 (S.D. Calif. 1955); *aff'd*, 239 F.2d 532 (9th Cir. 1956), *aff'd without opinion by an equally divided court*, 356 U.S. 43, was recognized. The court below expressly repudiated the rationale of *Loew's, supra*, that a plagiarist who acts principally for commercial gain rather than to further scholarship or science may not avail himself of the fair use doctrine. Referring to that portion of the District Court's opinion in *Loew's* which held that where the dominant purpose of the plagiarism was to further a commercial end the copying could not be excused as a fair use, Judge Moore in the opinion below, said "Clearly that portion of the court's opinion is inconsistent with our decision in *Berlin* v. *E. C. Publications, Inc., infra*;"* (App. 39). The principle of *Berlin* v. *E. C. Publications, Inc.*, 329 F.2d 541 (2nd Cir. 1964), that commercial purpose would not negative fair use in a case of parody, was reaffirmed by Judge Moore and extended from parody, which was present in *Berlin*, to outright copying, present here.

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* Judge Moore also states that "the Ninth Circuit in affirming the district court did not mention 'commercial purpose.'" However, the Ninth Circuit expressly stated that it was affirming "for the reasons set forth in the opinion of [the District Judge]." 239 F.2d at 537

The conflict between the Ninth Circuit and the Second Circuit on the application of the fair use doctrine is clearly one of singular importance to the publishing industry. Resolution of the question by this Court is necessary to a proper application of this aspect of the copyright laws. The need for review by this Court is emphasized by the fact that the decision of the Ninth Circuit in *Loew's, supra,* was affirmed by this Court without opinion by an equally divided Court.

The Court of Appeals also held that the doctrine of fair use was applicable even though the copying was admittedly a substitute for independent research. In reaching this conclusion the Court of Appeals recognized that the rule it was announcing was at variance with that established in the Seventh Circuit in *Toksvig* v. *Bruce Publishing Co.,* 181 F.2d 644 (7th Cir. 1950). In *Toksvig* the Seventh Circuit held that where plaintiff prepared a biography of Hans Christian Andersen as a result of independent effort and research into Danish sources, defendant who did not engage in research, but who copied the translations of the Danish materials contained in plaintiff's work, could not excuse infringement under the doctrine of fair use, even though defendant had acknowledged plaintiff's work on the source of the materials.

In this case, the record is clear that little if no independent research went into the preparation of the Random House book and that the Look articles as well as other copyrighted materials were copied instead. Respondents used the Look articles to give the Random House book the flavor of authenticity which it would otherwise lack. Except with respect to a few instances of copying where credit was given to the author of the Look articles, the Look articles were copied in such a fashion as to make it appear that the material presented in the

Random House book was the result of the original creative effort and independent research of the author of that book. Under the circumstances, the decision of the Court of Appeals that the fair use doctrine may be applied where the purpose of the copying is to save time and effort would appear to represent the antithesis of the fair use doctrine as traditionally applied, and an emasculation of the protection of individual creative effort accorded by copyrights.

The doctrine of fair use is of such great importance to copyright owners and the publishing and allied industries that doubts as to its proper application and conflicts among circuits should not be permitted to stand. Only this Court can resolve the uncertainty.

There is a further factor affecting the desirability of review of the Court of Appeals' decision at this time. The Court of Appeals indicates that the fair use doctrine may be necessary to give effect to the constitutional purpose of the copyright laws expressed in Article I, Section 8 of the Constitution "to Promote the Progress of Science, and the useful Arts." The correlative of this assertion is that a denial of the application of the fair use doctrine to certain publication would be an unconstitutional exercise of the power to grant copyrights. The amended General Copyright Revision Bill (HR 4347) now pending before Congress for the first time introduces the concept of the fair use doctrine into the statutory copyright scheme. The bill as reported out of committee provides that fair use of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching, scholarship or research, is not an infringement of copyright." The Court of Appeals' decision raises the question whether the bill would be a constitutional exercise of Congressional power, and for that reason also deserves this Court's consideration at this time.

New York is the publishing center of the nation and more copyright cases arise in the Second Circuit than in any other circuit in the country.* Accordingly, the decisions of the Court of Appeals for the Second Circuit have a direct and profound effect on the entire publishing industry, and allied industries. Drastic departures by that court from established principles of copyright law should therefore be carefully scrutinized by this Court.

CONCLUSION

The writ should be granted for the reasons hereinabove stated.

Respectfully submitted,

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November 15, 1966

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* Approximately one-third of all publishers in the United States are headquartered within the bounds of the Second Circuit. *American Book Trade Directory*, 17th Ed. 1965-66, and according to the Administrative Office of the United States Courts, in fiscal 1966, which is a typical year, of the 458 copyright cases which were filed throughout the United States 167 or more than one third, were filed in the Second Circuit, substantially more than in any other circuit.

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APPENDIX "A"

Opinion of District Court Granting Preliminary Injunction

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 1532

ROSEMONT ENTERPRISES, INC.,

Plaintiff,

—against—

RANDOM HOUSE, INC. and JOHN KEATS,

Defendants.

BRYAN, *District Judge*:

In this action for copyright infringement seeking injunctive relief, damages and an accounting, plaintiff moves pursuant to 17 U.S.C. §§ 101 and 112[1] and Rule 65, F.R.C.P., for a preliminary injunction against further publication, distribution, advertising and sale of the allegedly infringing publication.

Plaintiff Rosemont Enterprises, Inc. (Rosement) is the present owner of the copyrights of three articles entitled

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1 § 101. "If any person shall infringe the copyright in any work protected under the copyrights laws of the United States such person shall be liable: (a) Injunction.—To an injunction restraining such infringement; * * *."

§ 112. "Any court * * * shall have power, upon complaint filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by this title, according to the course and principles of courts of equity, * * *."

"The Howard Hughes Story" by Stephen White, which were published in Look magazine in the issues of February 9, February 23 and March 9, 1954. On May 23, 1966 defendant Random House, Inc. (Random House) published a book entitled "Howard Hughes, a biography by John Keats" (defendant Keats). Howard Hughes is a rather enigmatic contemporary personality of considerable public interest.

Rosemont claims that the Random House biography of Hughes infringes the copyrighted Look articles which it owns by (1) directly quoting passages from the articles, (2) by copying material from the articles which is paraphrased in the book, and (3) by appropriating information from the articles obtained as a result of the author's research in lieu of independent research of its own. It urges that a prima facie case of infringement has been made out and that it is entitled to a preliminary injunction to prevent irreparable damage.

Defendants Random House and Keats deny any infringement of the Look copyrights and claim that whatever use was made of the material contained in such articles in their Hughes biography was permissible "fair use." They further claim that preliminary injunctive relief should be denied to Rosemont on various equitable considerations, including the "unclean hands" doctrine and failure to show any irreparable damage.

There is no dispute as to the validity of the copyrights on the Look articles or that Rosemont purchased them from Cowles Magazines, Inc., the publishers of Look, on May 20, 1966. Nor is there any question that Random House and Keats had access to the articles and were thoroughly familiar with them.

The basic questions presented here are (1) what use was made of the Look articles in the Random House book; (2) was such use a prima facie infringement of the Look copy-

rights as Rosemont claims; or (3) was such use permissible "fair use" as Random House contends.

The background facts here are of considerable importance.

(1)

Stephen White, the author of the Look articles was Assistant Managing Editor of Look and on its full-time staff. According to the affidavit of Leslie Midgley, the then Managing Editor of Look, under whose direction and supervision the articles were researched and written, White, Midgley and others on the Look staff worked on the project for some eight months; White interviewed dozens of people, assembled information from sources in various sections of the country, and had a number of personal conferences with Howard Hughes over some five months. The articles were based on this research.

The Look articles contain some 13,500 words and cover 18 of the over-size pages of Look interspersed with illustrations. The written material in the articles would fill from 36 to 39 pages of the size used in the Random House biography. The Look articles were characterized by Loomis, the senior Random House editor in charge of its Hughes biography as "by far the most authoritative pieces [on Howard Hughes] ever done."

(2)

Random House had been considering a biography of Hughes for some time prior to 1962. The preparation of the book seems to have been precipitated by an article on Hughes which appeared in the September 7, 1962 issue of Life magazine written by Thomas Thompson, a member of the Life staff. On the day that issue appeared, Random

House wrote to Thompson proposing that he write a biography of Hughes for publication by it. On September 28, 1962 Thompson agreed to deliver a completed manuscript on the life of Hughes in seven to eight months, while retaining his full-time employment with Life. He was given a $5,000 advance for writing and research and his total compensation was to be $12,500 and royalties. Random House knew that Thompson could only work on this book in his spare time since he was employed full-time by Life.

Thompson states that he did research on Hughes, personally interviewing some 15 people listed by name and a number of others, and employed a Texas newspaper man part-time to interview a number of Houston people.

Thompson was unable to produce a publishable manuscript within the seven to eight months allotted. However, he eventually submitted a draft manuscript which Loomis, the Random House editor, considered to require substantial additional work. By then Thompson had assumed added responsibilities in the Life organization and was unable to go further with the project.

Little additional was done on the book from the middle of 1963 to the latter part of 1964. Random House then sought another author to complete the book based on the work which Thompson had done and the materials available to him. Defendant Keats who had written several successful non-fiction books was engaged to complete the Hughes biography on that basis. Thompson's manuscript, news and copyrighted magazine articles, including the Look articles, and various other materials were turned over to Keats.

However, Keats was anxious to have further research done and requested that Random House provide him with a research assistant or funds for research. He also suggested that he attempt to interview Hughes in order to verify and supplement the material available. Finally, he

suggested that permission be obtained for the use of copyrighted material before him. All of these requests were turned down by Loomis and Keats was directed to proceed with the material he had at hand. At about this time Loomis wrote to Keats specifically calling his attention to the "authoritative" Look articles in case he had not already seen them.

During the editing of Keats' manuscript, there were numerous discussions about problems of copyright infringment and suggestions were made by Loomis that there be more paraphrasing and less quoting.

The Random House biography covering Hughes' activities through roughly 1965 is 304 pages long and contains about 116,000 words. Its publication date was May 23, 1966.

(3)

Rosemont is a Nevada corporation organized in September 1965 by two officers of the Hughes Tool Company and Hughes' attorney in New York, who are the sole stockholders. Its California offices were leased and furnished by one of Hughes corporations and its New York offices are those of Hughes' attorney. Even before it was formally organized, Rosemont entered into a contract with Howard Hughes on July 2, 1965, granting it the exclusive rights to publish and sell an authorized Hughes biography. Rosemont claims that it is presently engaged in preparing an authoritative biography of Hughes, has engaged a researcher and a writer and has spent or obligated some $27,000 on the project. Rosemont makes the further claim that the research necessary for a comprehensive Hughes biography would take two years to complete and would require an investment of over $100,000.

After negotiations, commenced in early April 1966, Rosemont, on May 20, 1966, acquired from Cowles Magazines, Inc., the publishers of Look, the copyrights for the Look articles for a consideration which included the grant to Look magazine of the right to negotiate with Rosemont for the exclusive serial rights on its authorized Hughes biography. The next day, counsel for Random House were informed that Rosemont claimed infringement. This action followed on May 26, 1966.

There had been several earlier conversations between attorneys for Hughes and executives of Random House in 1965 in which it was indicated that Hughes was opposed to the publication of the Random House biography and would make trouble if the book was published.

On February 17, 1966 Rosemont commenced suit in the New York Supreme Court against Random House and Keats. The precise nature of this action has not been made clear but as far as I can ascertain it is an action in the nature of unfair competition and invasion of rights of privacy. Depositions were taken in that action, several of which were made part of the record on this motion.

(4)

The basic test of copyright infringement is "whether the one charged with infringement has made an independent production, or made a substantial and unfair use of the complainants' work." *Nutt* v. *National Institute for Improvement of Memory*, 31 F.2d 236, 237 (2 Cir. 1929); *Davis* v. *DuPont de Nemours & Co.*, 240 F. Supp. 612, 617 (S.D.N.Y. 1965); see *Orgel* v. *Clark Boardman Co.*, 301 F.2d 119, 120 (2 Cir.), *cert. den.*, 371 U.S. 817 (1962).

In order to determine whether there is infringement in a given case it is necessary to consider the extent to which use was made of the work claimed to be infringed

and of its author's creative effort, expression, and original research as well as the nature of the work which is claimed to infringe and the amount of independent and original creative effort and research which went into its production.

(a)

The length of the three Look articles (some 13,500 words or 36 to 39 book size pages) is somewhat more than 11% of the length of the Random House book (some 116,000 words and 304 pages). The articles cover the Howard Hughes story up to 1954 when they were published, whereas the book carries Hughes up to 1965 and obviously contains a great deal of later material not touched on in the articles.

Rosemont claims that there are at least 41 separate instances of copying from the Look articles in the Random House book, comprising 27% of the first article and 14% of all three.

There is no doubt that there is copying. There are some 31 lines (about 256 words) in the book of direct quotations from the articles with credit to Stephen White, the author. In addition, some 8 lines (about 80 words) of the book concededly paraphrase a portion of the articles with White also credited.

Two of the quoted passages are those relating to the clash between Senator Brewster and Hughes at Senate Committee hearings (p. 210) and the appraisal of Hughes used at the opening paragraph of Chapter 30 (p. 265).

Both of these quotations are no doubt based upon facts but they are no mere recitals of fact. They are an expression by White of his own ideas and conclusions expressed in his own style and language and represent his own creative efforts. While it is of course true that

historical facts in a biographical piece are not copyrightable in themselves but are in the public domain, see, *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F.2d 83, 86 (2 Cir. 1939); *Lake* v. *Columbia Broadcasting System, Inc.*, 140 F. Supp. 707 (S.D. Calif. 1956); Nimmer, Copyright 127-28 (1964); *cf. Oxford Book Co.* v. *College Entrance Book Co.*, 98 F.2d 688, 691 (2 Cir. 1938), the manner in which such facts are expressed by the author and his own thoughts, descriptions and conclusions are plainly entitled to copyright protection. See, *e.g., Eisenschiml* v. *Fawcett Pub., Inc.*, 246 F.2d 598, 603 (7 Cir.), *cert. den.*, 355 U.S. 907 (1957); *De Acosta* v. *Brown*, 146 F.2d 408, 410 (2 Cir. 1944), *cert. den.*, 325 U.S. 862-3 (1945); *Holdredge* v. *Knight Pub. Corp.*, 214 F. Supp. 921, 923 (S.D. Calif. 1963). See generally, Nimmer, *supra* at pp. 128-32. These passages clearly fall into this category.

Two conversations, one between Hughes and the actor Skelton (p. 27), and the other between White and "one of Hollywood's best known stars" (pp. 266-67), are also quoted verbatim. While conversations of this nature may have taken place, as recounted by White, they are not mere uncopyrightable historical facts as Random House claims. The quoted material is White's own version of what occurred, expressed in his own language and part of his effort to picture Hughes and his personality and is thus copyrightable. See, *e.g., Harris* v. *Miller*, 50 U.S.P.Q. 306, 307-08 (S.D.N.Y. 1941); *Davis* v. *Bowes*, 209 Fed. 53, 56 (S.D.N.Y. 1913); aff'd on other grounds, 219 Fed. 178 (2 Cir. 1914); *Gilmore* v. *Anderson*, 38 Fed. 846, 848 (C.C. S.D.N.Y. 1889). Compare *Holdredge* v. *Knight Pub. Corp., supra*, 214 F. Supp. at p. 923. Even assuming that the dialogue involving White himself was an exact repetition of the conversation, certainly White's part in the conversation would be original and would have contributed to the reply elicited. It likewise is copyrightable material.

See *Harris* v. *Miller, supra*, 50 U.S.P.Q. at p. 308; Nimmer, *supra* at 129.

The 8 lines of conceded paraphrasing at page 244, also credited to White, deal primarily with facts. Random House contends that since this passage deals with factual materials which may be available from sources open to all, this material is not copyrightable. See *Oxford Book Co.* v. *College Entrance Book Co.*, 98 F.2d 688 (2 Cir. 1938); *Consumers Union* v. *Hobart Mfg. Co.*, 189 F. Supp. 275, 278 (S.D.N.Y. 1960). The argument is not well taken. While the facts dealt with may not be copyrightable in themselves, White's choice of words and style in expressing the facts or describing them is plainly entitled to copyright protection. See, *e.g.*, *Guthrie* v. *Curlett*, 36 F.2d 694, 696 (2 Cir. 1929); *Chicago Record-Herald Co.* v. *Tribune Ass'n*, 275 Fed. 797, 799 (7 Cir. 1921); *Davis* v. *Bowes*, 209 Fed. 53, 55-56 (S.D.N.Y. 1913) aff'd on other grounds, 219 Fed. 178 (2 Cir. 1914); Ball, Copyright and Literary Property 240-241 (1944); *cf. Holmes* v. *Hurst*, 174 U.S. 82, 86 (1899).

It is of course well settled that copying can be done by paraphrase as well as by literal reproduction and that such paraphrasing may be an infringement. See, e.g., *Nutt* v. *National Institute for Improvement of Memory*, 31 F.2d 236, 237 (2 Cir. 1929); *West Pub. Co.* v. *Lawyers' Co-operative Pub. Co.*, 79 Fed. 756, 763 (2 Cir. 1897) quoting with approval, *Lawrence* v. *Dana*, 15 Fed. Cas. 26, No. 8,136 (D. Mass. 1869); *Davis* v. *DuPont de Nemours & Co.*, 240 F. Supp. 612, 621 (S.D.N.Y. 1965).

The crediting of the quoted and concededly paraphrased material to White does not remove it from copyright protection. See *Toksvig* v. *Bruce Pub. Co.*, 181 F.2d 664, 666 (7 Cir. 1950); *Chicago Record-Herald Co.* v. *Tribune Ass'n*, 275 Fed. 797, 799 (7 Cir. 1921); *Henry Holt & Co.*

v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938); Nimmer, *supra* at p. 644.

Beyond the material quoted verbatim or concededly paraphrased, there are at least 12 instances where the use of particular phrases or slight rearrangement of language and sentence structure make it obvious that Look material was copied by paraphrase.

Four examples will suffice. At page 25 of the Look articles Hughes' first wife is described as the

> "• • • charming daughter of the distinguished Houston family that had given its name to Rice Institute. But Miss Rice was a few months older than Hughes, and her circle of male admirers was many years older • • •."

This is paraphrased at page 17 of the book as follows:

> "His bride was Ella Rice, a dark-haired, high-spirited daughter of the family that gave Rice Institute its name. She was some months older than he, and had beaux who were years older • • •."

Again describing Ella Hughes, the Look article reads at page 27

> "This was not what the belle of Houston had bargained for. She had been the idol of the young men and women of Texas, and a beauty whose invitations ranged throughout the entire south • • •."

This passage is paraphrased at page 38 of the book in the following language:

> "She had been one of the most popular, sought-after women in Texas, quite literally the belle of the ball; a young woman with invitations to gentle homes throughout the south • • •."

At page 23 of the Look articles, in discussing Hughes' predilection for employing Mormons it is said:

> "* * * An active Mormon tends to be a man of integrity who devotes himself slavishly to his job, and who neither drinks, smokes, nor gambles."

At page 244 of the book this passage is paraphrased:

> "* * * Hughes chose Mormons to serve him because the devout Mormon does not drink, smoke or gamble, [and] tends strictly to his job. * * *"

At page 25 of the Look articles it is said that

> "The company, under his [Hughes] management, *leaped ahead* * * *."

At page 17 of the book it is said

> "The already prosperous company *leaped ahead* under its new owner * * *."

It is highly unlikely that these and the other instances of the use of identical or highly similar wording, phrasing and structure could be the result of mere coincidence, particularly in the light of facts regarding the preparation and writing of the Random House biography which will be later discussed.

There are also a number of instances where facts, events or anecdotes in the Look articles are recounted in the book, but in language which, while not entirely dissimilar, cannot be said to be obvious paraphrasing.

Copying by paraphrasing may occur even where there is little or no identity of language between the respective passages. *Nutt* v. *National Institute for Improvement of Memory, supra* 31 F. 2d at p. 237, and where, as here, it appears that the claimed infringer had access to and

used the work claimed to be infringed, and copied portions of it, it may reasonably be inferred that additional portions dealing with the same subject matter have been appropriated even without identity of language. See *West Pub. Co.* v. *Lawyers' Co-operative Pub. Co.*, 79 Fed. 756 (2 Cir. 1897); *Ricker* v. *General Elec. Co.*, 162 F.2d 141, 142 (2 Cir. 1947). Such an inference may fairly be drawn here.

Finally, various anecdotes in the Look articles also recounted in the Random House book were available from other published sources. An example is the incident concerning Hughes' presence at the Harvard-Yale boat race with his father, appearing at pages 24 and 25 of the Look articles and pages 8 and 9 of the Random House book which had appeared in a 1938 article in the New Daily News and a July 1954 Associated Press story.[2]

It is not without significance that in these instances the Random House accounts bear a closer resemblance in terms of both style and content to the Look accounts than they do to the other available sources. And this is particularly significant in the light of the background facts concerning the preparation and writing of the Random House book. See *West Pub. Co.* v. *Lawyers' Co-operative Pub. Co., supra*, 79 Fed. at p. 762.

(b)

Was the use thus made of the material from the Look articles substantial? Plainly the Random House biography includes a great deal of material which is not covered by

[2] Of course, if the Associated Press story was taken from the Look articles in violation of the Look copyrights, this would neither remove the copyright protection nor permit the defendants to use the Look material. See *Gilmore* v. *Anderson*, 38 Fed. 846, 849 (C.C.S.D.N.Y. 1889).

the Look articles at all. But the test of substantiality in terms of copyright infringement is not how much of the allegedly infringing work was taken from the copyrighted material but how much of the copyrighted material was taken by the infringing work. See *Toksvig* v. *Bruce Pub. Co.*, 181 F.2d 664, 667 (7 Cir. 1950); *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2 Cir. 1936); *West Pub. Co.* v. *Lawyers' Co-operative Pub. Co.*, 79 Fed. 756, 763 (2 Cir. 1897) quoting with approval from *Lawrence* v. *Dana*, 15 Fed. Cas. 26, (No. 8,136) (D. Mass. 1869); *Henry Holt & Co.* v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 303-304 (E.D. Pa. 1938); 56 Colum. L. Rev. 585, 593-94 (1956).

Moreover, the question of infringement is not solely one of lines or inches but is concerned also with the quality and value of what is taken from the copyrighted work. See, e.g., *Toksvig* v. *Bruce Pub. Co.*, *supra*, 181 F.2d at p. 667; *De Acosta* v. *Brown*, 146 F.2d 408, 410 (2 Cir. 1944), *cert. den.*, 325 U.S. 862-3 (1945); *Chicago Record-Herald Co.* v. *Tribune Co.*, 275 Fed. 797, 799 (7 Cir. 1921). See generally Ball, *supra* at pp. 334-37.

As stated by Justice Story over a hundred years ago in the leading case of *Folsom* v. *Marsh*, 9 Fed. Cas. 342 (No. 4,901) (D. Mass. 1841):

> "If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto. * * * It is no defence that another person has appropriated a part, and not the whole, of any property." (P. 348).

The various anecdotes and incidents which have been appropriated are an important part of the articles and contribute a great deal to their color and tone. Their

importance is emphasized by the fact that much of this material was obtained as a result of extensive interviews which the author and his research associates had with Hughes who is well known for his unapproachability and that Keats had conducted no interviews as his attempt to interview Hughes was turned down by Random House.

Material which White and his associates obtained in the Hughes interviews is used extensively in the articles and gives an impression of authenticity which may well have led Random House to describe them as authoritative. Moreover, it is White's writing about the materials obtained from his various sources, using his individual language and form of expression which gives value to the articles.

Without attempting to appraise the value of the Look articles here, whatever value they had was "sensibly diminished" by the use made of portions of them in the Random House biography and the labors of the author were substantially and to an injurious extent appropriated. See also *MacDonald* v. *DuMaurier,* 144 F.2d 697, 700, 701 (2 Cir. 1944); *Karll* v. *Curtis Pub. Co.,* 39 F. Supp. 836 (E.D. Wisc. 1941); *Boosey* v. *Empire Music Co.,* 224 Fed. 646 (S.D.N.Y. 1915).

What was taken from the Look articles was substantial in both the quantitative and qualitative sense. The amount of material copied in terms of words and linage, though it may not constitute as much as 27% of the first article and 14% of the articles as a whole claimed by Rosemont, nevertheless amounts to a substantial portion of the work and cannot be considered de minimus. Compare *Toulmin* v. *Rike-Kumler Co.,* 316 F.2d 232 (6 Cir. 1963); *West Pub. Co.* v. *Lawyers' Co-operative Pub. Co.,* 79 Fed. 756, 759-61 (2 Cir. 1897); *Henry Holt & Co.* v. *Liggett & Myers Tobacco Co.,* 23 F. Supp. 302 (E.D. Pa.

1938); *De Prato Statuary Co.* v. *Giuliani Statuary Co.*, 189 Fed. 90 (C.C. Minn. 1911).

(c)

When the materials from the Look articles used in the Random House biography, the facts and circumstances before the court as to the writing of the book, the source material used and the research conducted, are considered together, there are strong indications that Look copyrighted material was used in substitution for independent research.

At the time Random House first engaged Thompson to write a Hughes biography it said "We want a lively fast moving unauthorized biography * * *." This is just what it got.

The book is not and does not purport to be a profound and scholarly biographical work. It is written in a journalistic vein to appeal to the popular market. The comment by the Kansas City Times reviewer that "* * * [the book] might be called 'instant biography,' the type put together with information that has already appeared in newspapers and magazines," may not be entirely a fair one, and other more favorabe reviews should not necessarily be discounted. But the book does rely heavily on previously published newspaper and magazine articles and similar sources.

It appears that Random's budget for the book did not provide any substantial funds for research and that it did not expect very much research to be done. Thompson who first worked on the book was able to do so only in his spare time and was given a relatively brief period in which to produce a manuscript. Thompson's account of the research in which he engaged is not impressive.

When Thompson found he did not have time to com-

plete the book and the task of finishing it was turned over to Keats, all Keats appears to have had before him was Thompson's manuscript and the previously published materials which Thompson had used. Thompson's manuscript has not been produced here.

Keats apparently was anxious to do additional research. His request for funds for this purpose was turned down by Random House and Keats was told to go ahead with the material he had.

Keats also suggested that he attempt to interview Hughes. This request was also refused.

Finally, Keats suggested that permission be obtained for the use of copyrighted material. This request was also refused and in several instances it was suggested to Keats that he paraphrase more in order to avoid copyright difficulties.

The copyrighted material available to both Thompson and Keats included the Look articles on which the Random House editor laid emphasis and which he described as the most authoritative pieces about Hughes yet written.

It may be, as Random House claims, that much of the material taken could have been obtained from other sources open to all. But it is no answer to a charge of infringement that the infringing work could have been created using elements fairly at the author's disposal. See *Davis* v. *DuPont de Nemours & Co.*, 240 F. Supp. 612, 620 (S.D.N.Y. 1965); *Alva Studios, Inc.* v. *Winninger*, 177 F. Supp. 265, 268 (S.D.N.Y. 1959).

"The question is not whether the * * * [author] could have obtained the same information by going to the same sources, but rather did * * * [he] go to the same sources and do * * * [his] own independent research?" *Toksvig* v. *Bruce Pub. Co.*, 181 F.2d 664, 667 (7 Cir. 1950); see *Nutt* v. *National Institute for Improvement of Memory*, 31 F.2d 236, 237 (2 Cir. 1929). For an author is no more entitled

to appropriate the fruits of another's labor and research than he is to use another's form of expression. See, e.g., *Orgel* v. *Clark Boardman Co.*, 301 F.2d 119, 120 (2 Cir.) *cert. den.*, 371 U.S. 817 (1962); *Eisenschiml* v. *Fawcett Pub. Inc.* 246 F.2d 598, 602-603 (7 Cir.), *cert. den.* 355 U.S. 907 (1957); *West Pub. Co.* v. *Lawyers' Co-operative Pub. Co.*, 79 Fed. 756, 763 (2 Cir. 1897); *Fred Fisher, Inc.* v. *Dillingham*, 298 Fed. 145, 150 (S.D.N.Y. 1924) (L. Hand, J.); Nimmer, Copyrights, 132-34 (1964). Here there are elements of the former as well as the latter.

(d)

'On the record before me as a whole I conclude that a prima facie showing of infringement of the Look copyrights by the Random House biography has been made.

(5)

Random House claims that there can be no infringement here because it made "fair use" of whatever materials were taken from the Look articles.

"Fair use" is "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner * * *." Ball, Copyright And Literary Property 260 (1944); see *Toksvig* v. *Bruce Pub. Co.*, 181 F.2d 664, 666 (7 Cir. 1950); *Holdredge* v. *Knight Pub. Corp.*, 214 F. Supp. 921, 924 (S.D.Calif. 1963). To determine whether fair use has been made of copyrighted material, the nature and objects of the selections made, the quantity and value of the material used and the extent to which the use may diminish the value of the original work, must be considered. See, e.g., *Loew's, Inc.*

v. *Columbia Broadcasting System, Inc.*, 131 F. Supp. 165, 174-176 (S.D.Calif. 1955) *aff'd*, 239 F.2d 532 (9 Cir. 1956) aff'd without opinion by an equally divided court, 356 U.S. 43 (1958); *Karll* v. *Curtis Pub. Co.*, 39 F. Supp. 836-7 (E.D. Wisc. 1941); *Henry Holt & Co.* v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938); Nimmer, *supra* at p. 645; see generally Ball, *supra* pp. 260-63.

In general "fair use" is limited to cases where copyrighted material is used for purposes of criticism or comment or in scholarly works of scientific or educational value. See, e.g., *Holdredge* v. *Knight Pub. Corp.*, *supra*, 214 F.Supp. at 924; *Loew's, Inc.* v. *Columbia Broadcasting System, Inc.*, *supra*, 131 F. Supp. at 175; *Henry Holt & Co.* v. *Liggett & Myers Tobacco Co.*, *supra*, 23 F. Supp. at p. 304; 56 Colum. L. Rev. 585, 594 (1956).

Where the borrowing work does not fall into these categories permissible fair use is severely restricted. See *Loew's, Inc.* v. *Columbia Broadcasting System, Inc.*, *supra*, 131 F.Supp. at 175. This is particularly so where the borrowing and borrowed works are of the same general nature, deal with the same subject matter, are published primarily for commercial purposes, and are likely to compete with one another to the detriment of the value of the copyrighted material. See *Loew's Inc.* v. *Columbia Broadcasting System, Inc.*, *supra*, 131 F. Supp. at 173-7; *Karll* v. *Curtis Pub. Co.*, *supra*, 39 F. Supp. at 837; *Social Register Ass'n* v. *Murphy*, 128 Fed. 116 (D. R.I. 1904); Nimmer, *supra*, pp. 646-47; 56 Colum. L. Rev. *supra*, at 596-97.

An author is of course entitled to consult original authorities and sources and may be guided and assisted by earlier copyrighted works. See *Benny* v. *Loew's, Inc.*, *supra*, 239 F.2d at p. 536; *Greenbie* v. *Noble*, 151 F. Supp. 45, 65 (S.D.N.Y. 1957); Ball, *supra* at pp. 300-01. Indeed, there are bound to be marked resemblances between two

works on the same subject matter. See *Eisenchiml* v. *Fawcett Pub., Inc., supra,* 246 F.2d at 604; *Chautauqua School of Nursing* v. *National School of Nursing,* 238 Fed. 151, 153 (2 Cir. 1916); *Greenbie* v. *Noble, supra,* 151 F. Supp. at 65. But an author is not entitled to appropriate the copyrighted fruits of another's labors in lieu of independent research. This is not "fair use." See *Toksvig* v. *Bruce Pub. Co., supra,* 181 F.2d at p. 666; *Benny* v. *Loew's, Inc., supra,* 239 F.2d at p. 536; *Social Register Ass'n* v. *Murphy, supra,* 128 Fed. 116; Ball, *supra* at pp. 294, 300; see also *Orgel* v. *Clark Boardman Co.,* 301 F.2d 119, 120 (2 Cir.), *cert. den.,* 371 U.S. 817 (1962); *West Pub. Co.* v. *Lawyers' Co-operative Pub. Co.,* 79 Fed. 756 (2 Cir. 1897); Nimmer, *supra* at pp. 132-34.

The "lively, fast moving" Random House biography is an account of an interesting current personality designed for the popular market. It can scarcely be said to be a scholarly scientific or educational work. It plainly is in competition with the Look articles dealing with the same current personality in the commercial market. The extensive borrowings from the Look articles in the well advertised and widely distributed Random House book can only diminish the value of the borrowed work.

The extent of the borrowings, the purposes for which the material was used and the apparent lack of independent research combine to indicate that there was not "fair use" of the Look material here. Compare *MacDonald* v. *DuMaurier,* 144 F.2d 696, 701 (2 Cir. 1944); *Holdredge* v. *Knight Pub. Corp., supra,* 214 F. Supp. at 924.

(6)

Random House urges that in any event Rosemont should be denied equitable relief here because it comes into a court of equity with "unclean hands." The rather

involved argument runs this way:– Rosemont is a mere tool or creature of Howard Hughes; its agreement with Hughes for the publication of his authorized biography is a sham and there is no intention of ever publishing such a book; the purchase of the Look and other copyrights by Rosemont is part of a scheme by Hughes and his associates to suppress any biography of him; all this is demonstrated by the circumstances under which Rosemont was organized, the threats made by one of Hughes' attorneys to Random House to make trouble in the event its biography was published, the suit instituted against Random House by Rosemont in the New York Supreme Court and the purchase of the Look copyrights on the eve of the Random House date of publication;—all of which is said to show egregious misuse of the copyright statute. It is suggested that Rosemont's conduct is "almost barratry" and even poses a question of suppression of free speech of constitutional dimensions.

There are several difficulties with this theory. In the first place it is in large measure based on surmise and conjecture. It certainly cannot be said on the evidence before me that defendants have established even prima facie a plot or scheme to suppress any biography about Hughes.

But assuming, as defendants claim, that Rosemont is controlled by Hughes and is doing his bidding (and this is certainly not unlikely), and that Hughes' object is to take the Random House biography off the market, I do not see that anything has been done which is not within Hughes' or Rosemont's legal rights or is in violation of law.

In this action Rosemont is relying solely on its statutory rights to prevent infringement of the copyrights granted to the Look articles. It does not and could not urge here that no biography of Hughes can be published. As long

as Random House does not appropriate copyrighted material belonging to Rosemont, it is free to publish any biography it chooses as far as this court is concerned. Whether any biography can be published may be an issue raised in the pending state court action (and the issues in that action are not at all clear to me) but is certainly not in any way before me.

Rosemont plainly had the right to purchase the copyrights of the Look articles from the responsible publishers of that magazine for a consideration, including the right to negotiate the first serial rights for an authorized Hughes biography. Hughes had the right to set up a corporation to publish his authorized biography and to acquire any copyrights of previously published material. Nothing has been shown to me which would bar the plaintiff from enforcing its rights as copyright owner if such rights have been violated.

The suggestion that the institution of this action by Rosement is "almost barratry", i.e., "the practice of exciting groundless judicial proceedings," New York Penal Law, § 320, refutes itself. Nor can I discern any issue of constitutional dimensions involving free speech in this action for infringement of statutory copyright.

There is no showing here of misuse of copyright which would impel me to deny equitable relief in the exercise of my discretion or otherwise. See Nimmer, *supra* at pp. 662-64; compare *Greenbie* v. *Noble*, 151 F. Supp. 45, 61-62 (S.D.N.Y. 1957); *Southern Music Pub.* v. *Seeco Records, Inc.*, 200 F. Supp. 705 (S.D.N.Y. 1960); *Columbia Pictures Corp.* v. *Coomer*, 99 F. Supp. 481 (E.D.Ky. 1951).

(7)

When a prima facie showing of copyright infringement has been made, plaintiffs are entitled to a preliminary

injunction without the detailed showing of likelihood of irreparable damage which is ordinarily required for preliminary injunctive relief. See, e.g., *Rushton* v. *Vitale*, 218 F.2d 434, 436 (2 Cir. 1955); *Joshua Meier Co.* v. *Albany Novelty Mfg. Co.*, 236 F.2d 144, 147 (2 Cir. 1956); *American Code Co.* v. *Bensenger*, 282 Fed. 829, 835 (2 Cir. 1922); Ball, *supra* at p. 650.

Plainly the value of the copyrighted Look articles will be permanently lessened by further circulation of the Random House biography with the infringing material included. Moreover, the value of any future Hughes biography published by Rosemont insofar as it may use the Look copyrighted material will be permanently impaired.

Random House urges that preliminary injunctive relief should be denied here because the damage that would result to its investment in its already published book outweighs any harm which might be suffered by Rosemont. But wilful infringers, as defendants here appear prima facie to be, are not immune from the injunctive remedy because a substantial investment has been made in the infringing work. See *L. C. Page & Co.* v. *Fox Film Corp.*, 83 F.2d 196, 200 (2 Cir. 1936); *Inge* v. *Twentieth Century-Fox Film Corp.*, 143 F. Supp. 294, 301 (S.D.N.Y. 1956); Ball, *supra* pp. 652-53.

Nor is injunctive relief barred because only part of the infringing work infringes. See, e.g., *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2 Cir. 1936); *Historical Pub. Co.* v. *Jones Bros. Pub. Co.*, 231 Fed. 638, 644-45 (3 Cir. 1916); *West Pub. Co.* v. *Lawyers' Co-operative Pub. Co.*, 79 Fed. 756 (2 Cir. 1897); *DePrato Statuary Co.* v. *Giuliani Statuary Co.*, 189 Fed. 90 (D. Minn. 1911); *Lawrence* v. *Dana*, 15 Fed. Cas. 26, 62 (No. 8,136) (D. Mass. 1869); Copinger, Copyright (7 Ed. 1936) pp. 156-7.

I find there is a sufficient showing of irreparable damage to warrant the granting of preliminary injunctive relief.

CONCLUSION

I conclude that Rosemont has shown sufficient grounds for the preliminary injunctive relief which it seeks on this motion.

1. Wilful infringement of the copyrights owned by Rosemont by the Random House biography has been shown prima facie.

2. It appears to a "reasonable certainty" that Rosemont will ultimately succeed on the merits of the action. *Hall Signal Co.* v. *General Ry. Signal Co.*, 153 Fed. 907, 908 (2 Cir. 1907); see *Societe Comptoir de L'industrie* v. *Alexander's Dept. Stores, Inc.*, 299 F.2d 33, 35 (2 Cir. 1962).

3. Sufficient irreparable injury to Rosemont's copyrights has been shown.

4. It appears that equities in favor of Rosemont sufficiently over-balance those in favor of Random House as to justify preliminary relief.

The motion of Rosemont for a preliminary injunction is granted. An injunction will issue restraining the defendants, pending the final determination of this action or until further order of this court, from publishing, distributing, advertising, or selling any copies of the biography of "Howard Hughes, a biography by John Keats" which contain material infringing the plaintiff's copyrighted Look articles. See *Historical Pub. Co.* v. *Jones Bros. Pub. Co.*, 231 Fed. 638, 645 (3 Cir. 1916); *West Pub. Co.* v. *Lawyers' Co-operative Pub. Co.*, 79 Fed. 756 (2 Cir. 1897); *Social Register Ass'n* v. *Murphy*, 128 Fed. 116, 121 (D. R.I. 1904); Ball, *supra* p. 654.

Such an injunction will be conditioned upon a giving of

security by plaintiff in the sum of $75,000 for the payment of such costs and damages as may be incurred or suffered in the event that the defendants are found to have been wrongfully enjoined, pursuant to Rule 65, F.R.C.P.

The foregoing opinion constitutes my findings of fact and conclusions of law pursuant to Rule 52(a), F.R.C.P.

Settle order on notice.

Dated: New York, N.Y.
June 25, 1966

FREDERICK vP BRYAN
U. S. D. J.

Order of District Court Granting Preliminary Injunction

[SAME TITLE]

A motion for a preliminary injunction having come on to be heard on the 8th day of June, 1966, and Jack J. Katz, Esq. of Katz, Moselle & Schier, attorneys for plaintiff Rosemont Enterprises, Inc., having been heard in support of the motion, and Edward C. Wallace, Esq., of Weil, Gotshal & Manges, attorneys for defendant Random House, Inc., and Robert W. Maris, Esq. of Dilworth, Paxson, Kalish, Kohn & Dilks, attorneys for defendant John Keats, having been heard in opposition to the motion, and the Court having considered the complaint, and the affidavits, exhibits and memoranda filed in support of and in opposition to the motion, and due deliberation having

been had, and the Court having made findings of fact and conclusions of law in an opinion dated June 25, 1966, granting the motion in all respects, now, therefore, it is

ORDERED that defendant Random House, Inc. and its officers, agents, employees, attorneys and servants and defendant John Keats and his agents, servants, employees and attorneys and all persons in active concert or participation with either of them

> be, and they hereby are, enjoined and restrained pending the final determination of this action, or until further order of this Court, from publishing, distributing, advertising or selling any copies of the book entitled "Howard Hughes—A biography by John Keats" or any rights therein;

provided that pursuant to Rule 65, Fed. R. Civ. P., plaintiff give security in the sum of Seventy-five Thousand Dollars ($75,000) for the payment of such costs and damages as may be incurred or suffered in the event that defendants are found to have been wrongfully enjoined, such security to be approved by the Court or by the Clerk of the Court.

Dated: New York, N. Y.
June 30th, 1966.

FREDERICK vP BRYAN
U.S.D.J.

Memorandum of District Court Denying Defendants' Motion for Reargument

[SAME TITLE]

BRYAN, *District Judge:*

Defendants move for reargument of plaintiff's motion for a preliminary injunction which was granted in my opinion of June 25, 1966.

They urge reargument on the ground that affidavits of Gardner Cowles and John F. Harding of Look Magazine obtained subsequent to my decision, demonstrate that Rosemont acquired the Look copyrights solely for purposes of instituting this action in violation of New York Penal Law, § 275, forbidding champerty, and that therefore the assignment of the Look copyright to Rosemont is void and unenforceable.

As my opinion stated, Rosemont, in July 1965, entered into an agreement with Howard Hughes granting it the exclusive rights to publish and sell an authorized Hughes biography. It claims that it has since been preparing an authoritative biography of Hughes, has engaged a researcher and a writer and has spent or obligated substantial sums on the project and this claim has not been successfully controverted.

Rosemont acquired the copyrights of the Look articles in return for a grant to Look Magazine of the right to negotiate for the exclusive serial rights to that authorized biography. The acquisition of the copyrights bore a legitimate relationship to the publishing project on which Rosemont appears to have been engaged. The copyrights were acquired prior to the publication date of the Random

Memorandum of District Court Denying Defendants' Motion for Reargument

House biography and after negotiations begun over a month previously. The present action seeks, among other things, to restrain the future distribution and sale of the Hughes biography in violation of the copyrights which Rosemont had so acquired.

While § 275 of the New York Penal Law is very broad on its face, it was not designed to and has not been interpreted to bar business transactions of such a nature. See *Moran Towing & Transp. Co.* v. *Conners-Standard Marine Corp.*, 226 F. Supp. 1013, 1017-18 (S.D.N.Y. 1963), aff'd per curiam, 316 F.2d 811 (2 Cir.); *Welch* v. *Coro, Inc.*, 97 F. Supp. 185 (S.D.N.Y. 1951); *Famous Artists Schools* v. *Cook*, 121 N.Y.S. 2d 457 (Municipal Ct. 1953). See also N.Y. Penal Law § 275-a. Compare *Bennett, Atty. Gen. ex rel. N.Y. County Lawyer's Ass'n* v. *Supreme Enforcement Corp.*, 293 N.Y. Supp. 870, 250 App. Div. 265 (1st Dept. 1937), aff'd per curiam, 275 N.Y. 502, 11 N.E. 2d 315; *Seth-Howard Corp.* v. *Schupner*, 77 N.Y.S. 2d 892 (Sup. Ct. 1948); *Commission for Polish Relief, Ltd.* v. *Banca Nationala A Romaniei*, 176 Misc. 1064, 27 N.Y.S. 2d 377 (Sup. Ct. 1941).

This is quite apart from the further question as to whether a state statute such as this could operate to restrict assignability of copyrights under federal copyright law. See 17 U.S.C. § 28; *cf. Welch* v. *Coro, Inc.*, *supra*, 97 F. Supp. at p. 187.

As I said in my opinion, "Nothing has been shown here which would bar the plaintiff from enforcing its rights as copyright owner if such rights have been violated."

While the briefs of the parties did not refer to New York Penal Law, § 275, and therefore my opinion did not allude to it, I discussed that section with counsel during oral argument and indicated then that the section was not a bar to this action.

Memorandum of District Court Denying Defendants' Motion for Reargument

The Cowles and Harding affidavits add little if anything of significance to the factual picture already before the court and do not indicate to me that the conduct of Rosemont was champertous or in violation of § 275.

The motion for reargument is denied.

It is so ordered.

Dated: New York, N.Y.
July 13, 1966

/s/ Frederick vP Bryan
U. S. D. J.

APPENDIX "B"

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 473—September Term, 1965.

(Argued August 1, 1966 Decided August 17, 1966.)

Docket No. 30672

ROSEMONT ENTERPRISES, INC.,
Plaintiff-Appellee,

—against—

RANDOM HOUSE, INC. and JOHN KEATS,
Defendants-Appellants.

Before:

LUMBARD, *Chief Judge*,
MOORE and HAYS, *Circuit Judges*.

MOORE, *Circuit Judge:*

On May 26, 1966, plaintiff-appellee, Rosemont Enterprises, Inc. (Rosemont) commenced this action in the district court alleging that copyrights which it owned on a series of articles entitled "The Howard Hughes Story" which appeared in Look Magazine in early 1954 were infringed by a book entitled "Howard Hughes—a Biography by John Keats" published on May 23, 1966 by defendant-

appellant, Random House, Inc. In June, Rosemont made a motion for a preliminary injunction restraining the sale, publication, distribution and advertisement of the biography pending final determination of the action on the ground that it had made out a prima facie case of infringement. The defendants, Random House, Inc. and John Keats, opposed the motion the grounds, *inter alia*, that the copying which was done was insubstantial and that, in any event, whatever use was made of the Look articles constituted a fair use and, thus, was privileged. The district court granted the motion for a preliminary injunction[1] and, in rejecting defendants' claim of fair use, narrowly confined the privilege to materials "used for purposes of criticism or comment or in scholarly works of scientific or educational value." In the district court's view, if a work is published "for commercial purposes" and is designed for the popular market, those responsible for its appearance are precluded from invoking the fair use privilege, regardless of the nature of the work involved. Since the court found that the Hughes biography "can scarcely be said to be a scholarly, scientific or educational work," and was designed for the popular market, it concluded that the fair use privilege was inappropriate here. For the reasons set forth below, we reverse.

The only issue presently before this court is: Was the preliminary injunction erroneously issued as a matter of law?

The articles entitled "The Howard Hughes Story" published in three issues of Look Magazine dated February 9, 23 and March 9, 1954, and copyrighted by its publisher, Cowles Communications, Inc., in January and February 1954 and the allegedly offending book, published in 1966,

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[1] The district court denied a motion for reargument by defendants on July 13, 1966.

"Howard Hughes—a Biography by John Keats," are before the court. The nature and extent of the infringement, if any, can be gauged by a comparison of the two writings. For the purposes of this appeal, an attempt will be made to restrict the factual statement to those undisputed items which bear upon a preliminary injunction.

The Circumstances Under Which Plaintiff Acquired the Look Copyrights

At the outset, defendants assert that plaintiff's conduct in acquiring the copyrights indicates that they were purchased solely for the purpose of bringing this lawsuit and, hence, plaintiff is deprived "of the right to relief as a matter of law and as a matter of equitable discretion."

From the facts as outlined in the district court's opinion, it appears that for some time prior to 1962 Random House had been considering a biography of Howard Hughes who by reason of his remarkable exploits and achievements, primarily in the aviation and motion picture fields, had become quite a public figure despite a publicized passion for personal anonymity. To prepare such a biography, Random House in September of 1962 engaged the services of Thomas Thompson, a member of the staff of Life Magazine. After submitting his draft manuscript, Thompson for business reasons could not continue with the additional work necessary for its completion. In the latter part of 1964, Random House obtained the services of an author, the defendant, John Keats, who took the Thompson manuscript, news and copyrighted magazine articles, including the 1954 Look articles, and various public documents, and produced the biography now before the court.

Apparently Hughes and/or his attorneys learned of the forthcoming Random House publication, and his attorney warned Random House that Hughes was opposed to the

biography "and would make trouble if the book was published." The legal effect of the "trouble" should not be pre-judged at this time, except as certain aspects bear upon the granting of the preliminary injunction. Whether there be any reality to the claim that the plaintiff Rosemont, organized in September 1965 by Hughes' attorney and two officers of his wholly-owned Hughes Tool Company, is engaged in writing a Hughes biography, must await the trial. For the present, it is sufficient to note that in February 1966 plaintiff, having by some means obtained a galley proof of the forthcoming biography, brought an action against defendants in the Supreme Court of New York alleging in substance a plan to exploit commercially the name and personality of Hughes and an invasion of his right of privacy.

On May 20, 1966, plaintiff obtained from Cowles Communications, Inc. (Look), the copyrights to the 1954 Look articles, so advised Random House the next day and brought this suit five days later. Apparently Look had done nothing with the articles since 1954; they had not been compiled into book form or reprinted or offered to the public in any manner except as articles in three February and March 1954 editions of Look. Nor is there any indication that Look, although advised of the proposed Random House biography, intended to bring an infringement action or to seek an injunction. However, whether the "trouble" threatened will have legal consequences sufficient to constitute a defense cannot be determined upon the facts as adduced at this stage. Nevertheless, we have referred with approval to the rule that "'The interference of the court by injunction being founded on pure equitable principles, a man who comes to the court must be able to show that his own conduct in the transaction has been consistent with equity.'" *T. B. Harms v. Stern,* 231 Fed. 645, 649 (2 Cir., 1916).

Opinion of Court of Appeals

A Comparison of the 1954 Look Articles and the 1966 Biography.

The three 1954 Look articles contain some 13,500 words and would have, if published in book form (which they were not), filled some 36 to 39 book-size pages. The 1966 biography consists of some 116,000 words and 304 pages. The Look articles do not purport to be a biography in the accepted meaning of the word but narrate certain phases or highlights of Hughes' quite eventful career. Naturally, any writing purporting to deal with the life of a public figure is bound to touch upon the same events as have given rise to the publicity. In addition, various incidents of interest to the reading public can usually be developed from friends, neighbors, teachers, business associates, employees, newspaper and magazine articles and public and private records. And so here the biography gives evidence of such source material. Moreover, there can be little doubt that portions of the Look articles were copied. Two direct quotations and one eight-line paraphrase are attributed to Stephen White, the author of the articles. A mere reading of the Look articles, however, indicates that there is considerable doubt as to whether the copied and paraphrased matter constitutes a material and substantial portion of those articles. On the other hand, the material at most forms an insubstantial part of the 304-page biography. Furthermore, while the mode of expression employed by White is entitled to copyright protection, he could not acquire by copyright a monopoly in the narration of historical events. Finally, in an affidavit submitted to the district court, Thompson asserted that he engaged in extensive research while preparing his manuscript, which included personal interviews with many people familiar with Hughes'

activities (fifteen of whom he listed by name)[2] and the employment of a Houston newspaper man to conduct additional interviews for him. There is no dispute that defendant Keats, named as author of the biography, was retained solely to revise Thompson's manuscript which, as described in his contract with Random House, was to include rewriting and reorganization; rechecking facts against the sources used; and such additional research as was necessary to "update the work and fill in facts and events."[3] In any event, the extent of Keats' independent research is of little relevance since Thompson's work, embodied in the manuscript, formed the core of the published biography.

While it is undoubtedly true, as the district court observed, that "the book does rely heavily on previously published newspaper and magazine articles and similar material," that fact does not create a presumption of infringement. At this time, we are not prepared to hold that as a matter of law there has been a clear showing of probable success at a trial with respect to the extent and quality of infringement of the Look articles which warrants the grant of a preliminary injunction.

Fair Use

There is no question that material appearing in the Look articles is contained in the Hughes biography. Appellants

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[2] While Rosemont submitted statements from two persons listed by Thompson stating that they were not interviewed by him, this merely raises an issue of fact for determination at a trial on the merits.

[3] Keats' own evaluation of the manuscript was that the greatest difficulty concerned accuracy and that various areas discussed had to be rechecked. He felt that only some areas in the manuscript required new research, particularly the area of corporate finance.

The present record contains no affidavit from Keats as he was unavailable when the instant motion was made.

contend, however, that the district court erred as a matter of law in refusing to honor their claim of fair use on the ground that the court unjustifiably restricted the privilege to scholarly works written and prepared for scholarly audiences. We agree.

"Fair use" is a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner . . ." *Ball, Copyright and Literary Property* 260 (1944). See generally *Latman, Fair Use of Copyrighted Works, Study No. 14, prepared for the Subcommittee on Patents, Trademarks and Copyrights, Senate Comm. on the Judiciary, 86th Cong., 2d Sess. (Comm. Print 1960).* The fundamental justification for the privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit, "To Promote the Progress of Science and the Useful Arts." *U. S. Const. art. 1, §8.* See *Mathews Conveyor Co.* v. *Palmer-Bee Co.*, 135 F. 2d 73 (6th Cir. 1943); *Note*, 56 *Colum. L. Rev.* 585, 595 (1956). To serve that purpose, "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry." *Berlin* v. *E. C. Publications Inc.*, 329 F. 2d 541, 544 (2d Cir. 1964). Whether the privilege may justifiably be applied to particular materials turns initially on the nature of the materials, e.g., whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently, the privilege has been applied to works in the fields of science, law, medicine, history and biography. See Latman, *supra* at 10.

Biographies, of course, are fundamentally personal histories and it is both reasonable and customary for biog-

raphers to refer to and utilize earlier works dealing with the subject of the work and occasionally to quote directly from such works. Cf. *Harriss* v. *Miller*, 50 U. S. P. Q. 306, 309 (S. D. N. Y. 1941). This practice is permitted because of the public benefit in encouraging the development of historical and biographical works and their public distribution, e.g., so "that the world may not be deprived of improvements; or the progress of the arts be retarded." *Sayre* v. *Moore*, 1 East. 361, 102 Eng. Rep. 138, 139 (K. B. 1801); see *West Publishing Co.* v. *Edward Thompson Co.*, 169 Fed. 833, 837 (E. D. N. Y. 1909).[4] Indeed, while the Hughes biography may not be a profound work, it may well provide valuable source material for future biographers (if any) of Hughes or for historians or social scientists. Contrary to the district court's view, the arts and sciences should be defined in their broadest terms, see *Samson & Murdock Co.* v. *Seaver-Radford Co.*, 140 Fed. 539, 541 (1st Cir. 1905), particularly in view of the development of the field of social sciences.

(a) *Commercial Gain*

Whether an author or publisher reaps economic benefits from the sale of a biographical work, or whether its publication is motivated in part by a desire for commercial gain, or whether it is designed for the popular market, i.e., the average citizen rather than the college professor,

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[4] As one noted authority has stated, "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if an author had a complete monopoly on everything in his book . . ." *Chafee, Reflections on the Law of Copyright*, 45 *Colum. L. Rev.* 503, 511 (1945). See, for example, the extensive sources listed by Albert J. Beveridge in The Life of John Marshall (4 vols.) (1919) and Eugene C. Gerhart in America's Advocate: Robert H. Jackson (1958).

has no bearing on whether a public benefit may be derived from such a work. Moreover, the district court in emphasizing the commercial aspects of the Hughes biography failed to recognize that "all publications presumably are operated for profit . . .," *Koussevitzky* v. *Allen, Towne & Heath,* 188 Misc. 479, 483, 68 N. Y. S. 2d 779, 783, aff'd 272 App. Div. 759, 69 N. Y. S. 2d 432 (1st Dept. 1947), and that "both commercial and artistic elements are involved in almost every [work] . . ." *Note,* 56 *Colum. L. Rev. supra* at 597. Thus, we conclude that whether an author or publisher has a commercial motive or writes in a popular style is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use. Cf. *Koussevitzky* v. *Allen, Towne & Heath,* 68 N. Y. S. 2d *supra,* 782-84 (construing N. Y. Civil Rights Law §51).[5] This conclusion is consistent with the position taken by this court in *Berlin* v. *E. C. Publications, Inc., supra.* There the holders of copyrights on various popular songs claimed that the publishers of "Mad" Magazine infringed the copyrights by placing parodies of the songs in their popular magazine. The plaintiffs broadly maintained that copying for commercial gain may never be fair use. This court rejected that position on the ground that it failed to "recognize parody and burlesque as independent forms of creative effort . . . worthy

[5] N. Y. Civil Rights Law §51 proscribes the use of a person's name, portrait or picture "for advertising purposes or for the purposes of trade . . ." The New York Courts have held that biographical works do not fall within the terms of the statute, emphasizing the necessity for avoiding the restriction of free speech. See *Koussevitzky* v. *Allen, Towne & Heath, supra;* cf. *New York Times* v. *Sullivan,* 376 U. S. 254, 266 (1964). They view the nature of the work, i.e., whether it is in the public interest, rather than possible profit motives as controlling. See *Estate of Hemingway* v. *Random House, Inc.,* 268 N.Y.S. 2d *supra* at 535.

of judicial protection in the public interest." *Id.* at 543. Similarly, the district court by maintaining that a biography that is designed for commercial success falls outside the protection of the fair use doctrine did not give adequate recognition to such works. Cf. *Estate of Hemingway* v. *Random House, Inc.*, 49 Misc. 2d 726, 728, 208 N. Y. S. 2d 531, 535, aff'd without opinion, 25 A. D. 2d 719, 269 N. Y. S. 2d 366 (1966). Biographical works, since their earliest beginnings in the *Dialogues* of Plato and *Symposium* of Xenophon relating the activities of Socrates, have been of perennial interest[6] not only because they deal with well-known persons but because their subject matter is human nature and they reflect the social, economic and political forces of the particular era involved. See generally 3 *Encyc. Britannica* 593C-598 (1959).[7]

The fair use privilege has been applied without question to other publications which have obviously been motivated in part by a desire for economic gain. See *Holdredge* v. *Knight Publishing Co.*, 214 F. Supp. 921 (S. D. Cal. 1963) (article in popular magazine); *Eisenschiml* v. *Fawcett Publications*, 246 F. 2d 598 (7th Cir. 1957) (article in popular magazine); *Toksvig* v. *Bruce Publishing Co.*, 181 F. 2d 664 (7th Cir. 1950) (popular biographical novel); *Huie* v. *National Broadcasting Co.*, 184 F. Supp. 198 (S. D. N. Y. 1960) (commercial television program); *Oxford Book Co.* v. *College Entrance Book Co.*, 98 F. 2d 688 (2d Cir. 1938) (history study outline).

The district court relied heavily on *Loew's, Inc.* v.

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[6] Biography has been a well established form in the United States since the first quarter of the nineteenth century. See generally, Edward H. O'Neill, A History of American Biography 1800-1935 (1935).

[7] Ralph Waldo Emerson once observed that "There is properly no history; only Biography." Essays: First Series (1841), History.

Columbia Broadcasting System, Inc., 131 F. Supp. 165, 174-76 (S. D. Cal. 1955), aff'd, 239 F. 2d 532 (9th Cir. 1956), aff'd without opinion by an equally divided court, 356 U.S. 43 (1958) to support its restrictive view of the fair use privilege. That case involved a claim of copyright infringement against Jack Benny for his television parody of the motion picture "Gaslight." The district court in finding an infringement insisted on distinguishing television parody from more scholarly endeavors, emphasizing its commercial nature. Clearly that portion of the court's opinion is inconsistent with our decision in *Berlin* v. *E. C. Publications, Inc., supra.* Moreover, the Ninth Circuit in affirming the district court did not mention "commercial purpose." Its decision rested solely on the conclusion that the television parody constituted a wholesale appropriation of the motion picture and thus was unlawful. 239 F. 2d at 536. Finally, it is clear that *Henry Holt & Co.* v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E. D. Pa. 1938) does not support the district court's position. There the court held that a tobacco company's use of three lines from a doctor's medical treatise in its advertising pamphlet did not constitute a fair use of the copyrighted material. The court's decision did not rest, however, on the fact that profit might result from the use of the medical information. Rather, the nature of the allegedly infringing work was deemed controlling, to wit, it was an advertisement with a purely commercial purpose which under no circumstances could be considered a work designed "for the advancement of . . . science or art." *Id.* at 304.[8] Cf. *Conde Nast Publications* v. *Vogue School of*

[8] The statement by former United States District Judge Leon R. Yankwich that where the appropriation of copyrighted material "is motivated by the desire to derive commercial benefit, the use . . . is unfair," *Yankwich, What Is Fair Use*, 22 *U. Chi. L. Rev.* 203, 209 (1954), referred to by the court in *Loew's Inc.* v.

Fashion Modelling, 105 F. Supp. 325 (S. D. N. Y. 1952). See also *College Entrance Book Co.* v. *Amsco Book Co.*, 119 F. 2d 874 (2d Cir. 1941).

(b) *The Public Interest*

By this preliminary injunction, the public is being deprived of an opportunity to become acquainted with the life of a person endowed with extraordinary talents who, by exercising these talents, made substantial contributions in the fields to which he chose to devote his unique abilities. Inheriting a small fortune in early youth, Hughes can hardly qualify as a Horatio Alger hero in a "From Rags to Riches" story but a narration of his initiative, ingenuity, determination and tireless work to achieve his conception of perfection in whatever he did ought to be available to a reading public which, even in an affluent society, might well be reminded that affluence usually comes from the work of such entrepreneurs in business and industry.

The Keats biography is laudatory and where critical is critical in an understanding fashion.[9] Judging by the accounts in the Look articles and the biography, Hughes has almost an obsession as to his privacy and his right thereto. However, when one enters the public arena to the extent that he has, the right of privacy must be tempered by a countervailing privilege that the public have some information concerning important public figures. Cf. *Sidis* v. *F-R Pub. Corp.*, 113 F. 2d 806, 809-10 (2d Cir.), *cert. denied*, 311 U. S. 711 (1940); *Estate of Hemingway* v. *Random House*, 268 N. Y. S. 2d *supra*, at 535; *Koussevitzky*

Columbia Broadcasting System, Inc., supra, was based solely on *Henry Holt & Co.* v. *Liggett & Myers Tobacco Co., supra*, and constitutes an overly broad interpretation of that decision.

[9] No claim has been made that the biography contains misrepresentations of fact.

v. *Allen, Towne & Heath*, 68 N.Y.S. 2d *supra*, at 782-84. The district court itself recognized that "Howard Hughes is a rather enigmatic contemporary personality of considerable public interest."

"Everybody will agree that at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy." *Sidis* v. *F-R Pub. Corp., supra* at 809. Hughes has long been a newsworthy personality. Any biography of Hughes, of necessity, must recite the events of his life because biography in itself is largely a compilation of the past. Thus, in balancing the equities at this time in our opinion the public interest should prevail over the possible damage to the copyright owner.

(c) *Independent Research*

One other aspect of the district court's decision bears discussion. While recognizing that "historical facts and events in themselves are in the public domain and are not entitled to copyright protection . . . ," *Lake* v. *Columbia Broadcasting System, Inc.*, 140 F. Supp. 707, 708-09 (S.D. Cal. 1956); see *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 83, 86 (2d Cir. 1939), and that "a writer may be guided by earlier copyrighted works . . . ," *Benny* v. *Loew's, Inc.*, 239 F. 2d *supra*, at 536; see *Oxford Book Co.* v. *College Entrance Book Co.*, 98 F. 2d 688, 691 (2d Cir. 1938), the court asserted in sweeping language that an author is not entitled to utilize the fruits of another's labor in lieu of independent research and, relying on *Toksvig* v. *Bruce Publishing Co.*, 181 F. 2d 644 (7th Cir. 1950), stated that such activity could not be considered a fair use. Moreover, the court assigned the "apparent lack of independent research" as an additional reason for refusing to honor defendant's fair use claim. With this conclusion we disagree as a matter of law.

In *Toksvig* v. *Bruce Publishing Co., supra,* the Seventh Circuit affirmed the grant of an injunction, in favor of an author who had written a careful biography of Hans Christian Andersen, based on exhaustive research into Danish sources, against the publication of a subsequent biography of Andersen by an author who due to his inability to speak or read Danish had not independently examined the Danish sources and who had copied twenty-four specific passages of the first author's book. While the decision can be considered to rest on the ground that substantial and material copying was demonstrated, see *Nimmer, Copyright* at 133n. 576 (1964), the court went on to say that the use of plaintiff's book was not a fair use for the reason that reliance on the English translations of the Danish sources enabled the defendant to complete her book in much less time than it took plaintiff. *Id.* at 667. We, however, cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. Cf. *Oxford Book Co.* v. *College Entrance Book Co.*, 98 F. 2d 688 (2d Cir. 1938). It is just such wasted effort that the proscription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent. See *Gorman, Copyright Protection for the Collection and Representation of Facts*, 76 *Harv. L. Rev.* 1569, 1584 (1963) (criticizing *Toksvig* v. *Bruce Publishing Co., supra*).

Our decision in *Orgel* v. *Clark Boardman Co.*, 301 F. 2d 119 (2d Cir.), *cert. denied*, 371 U. S. 817 (1962), does not require a contrary result. There this court affirmed a finding of infringement where the author of a law book on eminent domain "lifted" the essence of a prior treatise on the same subject and adopted as his own the prior author's "analysis, organization of material, phrasing and cita-

tions. . . ." *Id.* at 120. In that context the court remarked that one cannot appropriate the "fruits of another's labor and skill in order to publish a rival work . . .," *ibid.*, citing *West Publishing Co.* v. *Edward Thompson Co.*, 176 Fed. 833 (2d Cir. 1910). In *West Publishing Co., supra,* this court merely pointed out that extensive copying of lists of judicial decisions or of headnotes in digests of cases contained in one published report of cases and legal digests by another publisher of similar material cannot be considered a fair use of the material whether or not it enabled one publisher to save time and effort. *Id.* at 838. The point simply is that "the second historian or second directory publisher cannot bodily appropriate the research of his predecessor." *Huie* v. *National Broadcasting Co.*, 184 F. Supp. 198, 200 (S. D. N. Y. 1960). The fair use privilege is based on the concept of reasonableness and extensive verbatim copying or paraphrasing of material set down by another cannot satisfy that standard. See *Holdredge* v. *Knight Publishing Co.*, 214 F. Supp. 921, 924 (S. D. N. Y. 1963); see *Benny* v. *Loew's Inc.*, 239 F. 2d *supra,* at 536. See also *MacDonald* v. *DuMaurier*, 144 F. 2d 696, 701 (2d Cir. 1944).

Lastly, in deciding whether a preliminary injunction should be granted, the possibilities of injury present and potential to the respective parties must be considered and weighed. There is no suggestion that the Look articles are in current publication or ever have been since their single appearance in 1954. There is no claim that any royalties are being received from the Look articles or that any revenue is being derived therefrom. The Look articles and the biography are not in competition with each other. Moreover, one can only speculate at this time as to when, if ever, Rosemont will produce Hughes' authorized biography. In sum, there has been no showing that the biography

has lessened the value of the articles copyrighted by Cowles. See *Life Music, Inc.* v. *Wonderland Music Co.*, 241 F. Supp. 653 (S. D. N. Y., 1965).

Compelling reasons for not granting a preliminary injunction in a case such as this have recently been stated by the New York courts. In *Pocket Books, Inc.* v. *Dell Publishing*, 49 Misc. 2d 252, 256 (1966), involving the title, "The Girl from 'Peyton Place,'" of a biography of Grace Metalious, the Court said:

> "A preliminary injunction is a drastic remedy, and the court's reluctance to so intervene and condemn in this manner and at this stage of the action is heightened by the realization that we are here dealing with a book and not with an ordinary subject of commerce."

In *Estate of Hemingway* v. *Random House, supra*, where the plaintiff, the widow of Ernest Hemingway, sought to enjoin the then forthcoming publication of a biographical study of Hemingway, the Court stated at 268 N. Y. S. 2d 534:

> "A preliminary injunction is always a drastic remedy and the one seeking to invoke such stringent relief is obliged to establish a clear and compelling legal right thereto based upon undisputed facts. The normal reluctance to impose a summary restraint in advance of a full and complete trial is particularly acute in a case such as this which deals with the publication of a book. Before the court will intrude into an area fraught with sensitivity in its possible impingement upon fundamental democratic and intellectual institutions, it will require a showing by the movant of a right, both legal and factual, in most unequivocal terms."

Furthermore, if upon the trial infringement to any extent were to be established, there seems to be no dispute that Random House would be able to respond to such damages as might be found.

The order granting a preliminary injunction is reversed and the injunction is vacated.

LUMBARD, Chief Judge, concurring, with whom Hays, Circuit Judge, also concurs:

The district court should have denied any preliminary injunction to this plaintiff as there was good reason to believe that it was the instrument of Howard Hughes, created principally for the purpose of suppressing the biography of Hughes which Random House had published. We cannot approve an injunction under such circumstances as the plaintiff does not come here with clean hands. It has never been the purpose of the copyright laws to restrict the dissemination of information about persons in the public eye even though those concerned may not welcome the resulting publicity. It is the purpose of those laws to give reasonable protection to the product of an author and his manner of expression where the author's proper interest in the product might suffer thereby. It would be contrary to the public interest to permit any man to buy up the copyright to anything written about himself and to use his copyright ownership to restrain others from publishing biographical material concerning him.

The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.

Such undisputed facts as were before the district court seem to me to point to the existence of a scheme developed

by Hughes and his attorneys and employees to prevent the publication of any biography of Hughes and, in particular, the Random House biography.

By June 1965, Hughes had learned that Random House intended to publish a full length biography about his life. Through Gregson Bautzer, his California lawyer, Hughes told Bennett Cerf, Random House's chief executive, that he opposed its publication. He further informed Mr. Cerf that if Random House did not decide against its publication, Hughes, by means of his great resources could and would cause endless trouble.

Rosemont claims that on July 2, 1965 Hughes entered into an agreement with it whereby he gave to Rosemont the sole and exclusive right to publish his life story.[1] In any event, on September 16, 1965, Rosemont was incorporated, listing as its sole shareholders, a retired Hughes Tool Co. executive, a present Hughes Tool Co. executive, and Chester Davis, Hughes' New York lawyer. There is ample factual basis in the record to demonstrate that Rosemont was dominated by Hughes himself: employees of his wholly owned Hughes Productions open Rosemont's important mail, answer its telephone, and perform clerical and computer work for Rosemont, all without charge. In addition, Rosemont's part-time research man has testified that he takes his orders from a Hughes Tool Co. executive.

On September 29, Chester Davis contacted Mr. Cerf and informed him of the Hughes-Rosemont agreement. This was at Bautzer's suggestion. Thereafter, on February 17, 1966, Rosemont instituted a suit against Random House in the New York State courts, claiming a violation of its exclusive right to publish a Hughes biography. Despite the apparent frivolous nature of the claim, extensive dis-

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[1] There would seem to be some question as to exactly when this agreement was entered into as it was not acknowledged until September 27, 1965.

covery proceedings followed in which Random House opened its files to Rosemont. At about the same time, Bautzer again called upon Mr. Cerf and told him that Hughes would make it "financially worthwhile" to Random House and the author to discontinue the biography. In addition, notwithstanding the Hughes agreement with Rosemont, he offered Hughes' cooperation in the publication of an "authorized" biography by Random House. When Cerf asked what assurances could be given, he stated that Hughes would be willing to pay a penalty if such cooperation were not forthcoming.

During March 1966, a dozen advance galley proofs of the biography were sent by Random House to leading magazines and newspapers for review purposes. Rosemont acquired a copy through unknown channels. Thereafter, Rosemont commenced negotiations with Cowles Communications, Inc., the publisher of Look Magazine, to obtain the copyright to the 1954 Look magazine articles.

Affidavits by Gardner Cowles, the chief executive of Cowles Communications, and by an executive vice-president of Cowles state: (1) that the assignment was requested only after Cowles failed to indicate whether it would take copyright action against Random House; (2) that such assignment was requested in order that the copyrights might be used in negotiation with Random House to prevent further distribution of the book,[2] and (3) that the copyrights could not be assigned to Hughes, they were told, since that might force Hughes to appear at a deposition. The affidavits further state that Hughes' lawyers admitted during the negotiation that Rosemont was merely a Hughes-controlled company and that Hughes was very upset about Random House's intended publication.

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[2] True Magazine in April 1966 printed a condensed version of the Random House biography. Cowles took no action against this publication.

On May 20, 1966, Cowles and Rosemont entered into an agreement, Cowles assigned the copyrights in return for obtaining a right of first refusal on a serialization of Rosemont's Hughes biography, if and when it is ready for publication. The agreement continued, showing Hughes' interest in the copyright as it was recognized by the parties to the agreement:

> "We [Rosemont] agree that with reference to the assignment of copyrights or material given us by you we will not assign such copyrights to any person, firm or corporation other than Howard Hughes, or any corporation owned or controlled by him, or to our stockholders, provided Howard Hughes consents thereto."

Six days later, on May 26, 1966, Rosemont commenced this action in the district court.

Nor were Rosemont's efforts to stop publication of material about Hughes confined to Random House. During this same period, Lyle Stuart, Inc., a New York publisher, commissioned author Ezra Goodman to write a Hughes biography. Following this, on November 22, 1965, Goodman then entered into two agreements with Rosemont. First, Goodman agreed not to submit any material to his publisher unless it was first cleared with Rosemont. Under this contract Goodman's lawyer received $4,250. In a second agreement of the same date, Rosemont agreed to pay Goodman $38,250 purportedly for Goodman's unpublished manuscript of the life of D. W. Griffith. Rosemont thereafter rejected the manuscript on Hughes.[3] Thus nothing

[3] It was agreed by Goodman and Rosemont that any disputes arising from the contract would be submitted to binding arbitration by Perry Lieber, a public relations man for Howard Hughes and the Hughes Tool Company. He also found the manuscript unpublishable.

came of Lyle Stuart's attempts to publish a biography of Hughes.[4]

The implications from all the above facts are obvious. Hughes wanted nothing written about himself, the publication of which he could not control. The Rosemont Corporation was created to this end. The purchase of the Look copyright was a part of Hughes' plan to prevent the publication of a biography.[5] It is inherent in the nature of a man's biography that the major events in his life must be treated, and some similarity with prior works is thus inevitable. As such, a claim of infringement may often be a colorable one.

Here, Rosemont Enterprises acquired the Look copyright and sued upon it six days later asking injunctive relief, not with a desire to protect the value of the original writing but to suppress the Random House biography because Hughes wished to prevent its publication.

The plaintiff's conduct in this transaction was not consistent with the equity it seeks; it came into court with unclean hands. This, of itself, was sufficient reason why the district court should not have granted the preliminary injunction.

Of course I agree with the other reasons set forth in Judge Moore's opinion to support the conclusion that the district court should not have restrained the publication of the biography.

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[4] Sometime after the Rosemont-Goodman arrangements, Lyle Stuart, Inc. commenced an action in Supreme Court, New York County against Rosemont Enterprises, Howard Hughes, Gregson Bautzer, Chester C. Davis and Perry Lieber.

[5] Rosemont Enterprises, Inc. has subsequently acquired the copyright to *The Howard Hughes Story* by Adela Roger St. Johns, an article which appeared in the American Weekly Magazine dated April 13, 1947.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of August one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
Circuit Judges.

ROSEMONT ENTERPRISES, INC.,
Plaintiff-Appellee,

v.

RANDOM HOUSE, INC., and JOHN KEATS,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment of Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the preliminary injunction be and it hereby is vacated in accordance with the opinion of this court with costs to the appellants.

A. DANIEL FUSARO
Clerk